

Pages 1 - 78

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
VS.)	NO. CR 16-00411-1 VC
)	
NAUM MORGOVSKY,)	
)	
Defendant.)	
)	

San Francisco, California
Thursday, November 13, 2018

TRANSCRIPT OF PROCEEDINGS

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20 Also Present:

21 **Catheryn Grier, U.S. Probation**

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1 Thursday - November 13, 20181 9:07 a.m.2 P R O C E E D I N G S3 ---000---4 **THE CLERK:** Calling Case Number 16-cr-00411, U.S.A.

5 versus Naum Morgovsky.

6 Counsel, please step forward and state your appearances
7 for the record.8 **MR. SAMPSON:** Good morning, Your Honor. Colin
9 Sampson, Jason McCullough, and Erin Cornell for the
10 United States.11 **THE COURT:** Good morning.12 **MR. OSTERHOUDT:** Good morning, Your Honor. William
13 Osterhoudt. Mr. Alan Ellis is here also on behalf of
14 Mr. Morgovsky. Mr. Morgovsky is present.15 **THE COURT:** Good morning.

16 Good morning, Mr. Morgovsky.

17 **THE DEFENDANT:** Good morning.18 **THE PROBATION OFFICER:** Catheryn Grier with
19 United States Probation.20 **THE COURT:** Good morning.21 So number one is I've received a couple of things this
22 morning. The Government filed something Friday night. I was
23 out of town this weekend so I did not receive it myself until
24 about half an hour before the sentencing hearing began, and
25 I've not read it and my inclination would be to not consider it

1 because if everybody keeps filing things at the last minute,
2 the sentencing is never going to happen. So my inclination is
3 not to consider that.

4 Also about 15 minutes ago Mr. Osterhoudt delivered a video
5 to my chambers, and that video apparently contains a number of
6 statements by Mr. Morgovsky's family and friends, which I
7 assume are very similar to what is already in writing in the
8 submissions that I've received. The audio does not work on
9 most of that video. My inclination would also be to not
10 consider that.

11 So let me first ask the Government. I mean, if you want
12 me to consider this, what you submitted on Friday night, I
13 think it means that the hearing is going to be continued yet
14 again. Do you want me to consider what you submitted Friday
15 night?

16 **MR. SAMPSON:** We're happy to proceed just with
17 argument, Your Honor.

18 **THE COURT:** Okay. All right.

19 **MR. OSTERHOUDT:** Your Honor, may I address our recent
20 submission?

21 I feel it's a very powerful submission. I know you've got
22 things in writing. For many years I also have filed documents
23 and letters from people, but I believe that the power of seeing
24 what some of the people on this video think about Mr. Morgovsky
25 and --

1 **THE COURT:** Well, then you should have submitted it
2 more than 15 minutes --

3 **MR. OSTERHOUDT:** I know --

4 **THE COURT:** -- before the sentencing hearing.

5 **MR. OSTERHOUDT:** -- but we didn't, and I apologize.

6 **THE COURT:** I'm not considering the video. I'm not
7 going to consider it. You can say whatever you want about it,
8 but I'm not considering the video. It was submitted too late.

9 **MR. OSTERHOUDT:** So what I'll say about it, if you
10 will permit me, is that there's several people who testified of
11 Mr. Morgovsky's extraordinary kindness to them when they came
12 to this country from Ukraine, from Russia; the manner in which
13 he gave employment to people when he couldn't afford to do so;
14 when he always with a selfless attitude contributed to people,
15 helped them get cars, taught them how to get driver's licenses.

16 **THE COURT:** Okay. And I'm happy to let you continue,
17 but the upshot of all of that is in the written submissions,
18 the lengthy written submissions, I've received from
19 Mr. Morgovsky's family and friends in the weeks leading up to
20 this sentencing hearing; right?

21 **MR. OSTERHOUDT:** Yes, but the one thing I'd like you
22 to see is his daughter's testimony on the video because --

23 **THE COURT:** I actually saw that. That was the one
24 part, as far as I can tell, that was not -- where the audio
25 worked was her statement at the beginning.

1 **MR. OSTERHOUDT:** Good. I wanted you to kind of see
2 that because I thought it was very powerful myself. Of course,
3 she's his daughter, but also she's observed him for very many
4 years and he's had a strong influence on her life and brought
5 her, she believes, to a position of being a strong woman in
6 business; and she thinks she relies heavily and gives him so
7 much credit for that.

8 And it's powerful, and I just wish we could have gotten it
9 to you earlier, but I hope you had an opportunity to view that
10 aspect of it because I think it is very strong, and we hope
11 that it would affect Your Honor's viewpoint of who this person
12 is as distinguished from what the evidence may show he did in
13 the case.

14 **THE COURT:** What the evidence may show that he did?

15 **MR. OSTERHOUDT:** I beg your pardon?

16 **THE COURT:** What the evidence may show that he did?

17 **MR. OSTERHOUDT:** Well, yeah. One can argue about the
18 detail, the edges. He's pled guilty, of course, but, you know,
19 along the edges, there's a lot of fuzz, you know, how far that
20 goes.

21 **THE COURT:** Yeah. And you'll have more of an
22 opportunity to discuss that.

23 Let me give you -- I think maybe I will start with the
24 Government, and let me give you some preliminary thinking and
25 you can address that and, of course, Mr. Morgovsky will have a

1 chance to address that.

2 First of all, on the issue of the guideline calculation,
3 you know, there are a number of references in the Government's
4 submissions to -- there are a number of statements along the
5 lines of "The Government stands ready to prove," "The
6 Government was ready to prove at trial."

7 You know, the issue here is what has the Government proved
8 in connection with sentencing and although I think that some of
9 these, you know, guideline questions are close questions, my
10 tentative thinking is that, you know, we have a base Offense
11 Level of 26, which I believe everybody agrees on. We have an
12 increase of two for the 1956 conviction, which I think
13 everybody agrees on. So that puts us at a base Offense Level
14 of 28.

15 Role in the offense, my tentative inclination is to go
16 with Mr. Morgovsky on that and say that he increased the
17 Offense Level by two points for his role in the offense.

18 And then there is the question of acceptance of
19 responsibility. My inclination is to conclude that
20 Mr. Morgovsky is not entitled to a reduction for acceptance of
21 responsibility because my conclusion, based on everything I've
22 seen so far, is that Mr. Morgovsky either continues to believe
23 he did absolutely nothing wrong or believes he did something
24 wrong and thinks he can talk his way out of it. One of those
25 two things.

1 And so I think that my inclination again at this point,
2 based on everything I've seen so far, is that he's not entitled
3 to a reduction for acceptance of responsibility. So that would
4 put us at an Offense Level of 20 -- excuse me -- 30.

5 And I would be tentatively inclined to say that his
6 Criminal History Category should be I. And one of the things
7 that makes me a little uncomfortable about assigning him a
8 Criminal History Category of II is that -- I'm trying to think
9 exactly how to put this, but it seems like the criminal conduct
10 for which he was convicted was part of the overall course of
11 conduct that he's here in court being sentenced for today, and
12 it feels a little strange to say that that's part of his prior
13 criminal history.

14 It's also his only conviction and it's a misdemeanor
15 conviction and it happened, like, 10 years ago or something
16 like that.

17 So when you consider all of that in its totality, I'm
18 happy to hear argument from you on the issue but it makes me --
19 it seems a little strange to ding him in terms of criminal
20 history for this conduct that is sort of part of the overall
21 course of conduct that he's currently in court for.

22 So assuming I am right about that, and I may not be, but
23 assuming I'm right about that, that leaves us at an Offense
24 Level of 30 with a Criminal History Category of I, which has us
25 in a guideline range of 97 to 121 months. And this

1 certainly -- based on everything I've seen so far, this seems
2 like -- you know, if you were to apply all the 3553(a) factors,
3 and we can talk more about them, this seems like it should be a
4 guideline sentence. This does not seem like the kind of case
5 where I should vary upward or that I should vary downward; that
6 it seems like it probably should be a guideline sentence.

7 And he could argue -- I mean, I'm happy to hear arguments
8 for upward variance and downward variance, and we can argue
9 about where, you know, the sentence should fall within the
10 range, but that is at least my initial tentative thinking.

11 So why don't I start with the Government.

12 **MR. SAMPSON:** Your Honor, if you don't mind, I'll
13 address the criminal history issue first.

14 **THE COURT:** Sure.

15 **MR. SAMPSON:** And we'll sort of reserve argument on
16 where in the guidelines Mr. Morgovsky's conduct should be.

17 With respect to his criminal history, Your Honor, yes, he
18 gets one point for the misdemeanor, which is appropriate, but I
19 do disagree with Your Honor in that the two-point enhancement
20 for committing some of the acts in the underlying crime is
21 appropriately added here.

22 Mr. Morgovsky, while on probation in front of Judge Spero,
23 really pivoted. He stopped using the Fradel passport, which he
24 was caught with, and then he opened up a bank account in the
25 name of Gary Piper. That's an account he used to launder

1 \$200,000. That's Count 10.

2 So Mr. Morgovsky, also during this one-year time frame, he
3 purchased numerous image intensifier tubes, in the hundreds; he
4 made numerous shipments to Infratech in Moscow during that
5 period; and he received approximately I think it's just under
6 \$1 million during that period in foreign wires, many of which
7 reference optical goods, optical parts and accessories.

8 So, Your Honor, the conspiracy and the conduct continued
9 unabated from before that time through this probation
10 undeterred and into what has led to his conviction.

11 Under those circumstances, Your Honor, the two-point
12 enhancement is entirely appropriate. It's contemplated by the
13 guidelines. It appropriately balances the conduct for which he
14 is being sentenced with the fact that he was under supervision
15 for another offense, and it's a very specific two-point
16 enhancement when that's the case. We believe it applies here.

17 **THE COURT:** I understand the argument. Anything else
18 the Government wants to add?

19 **MR. McCULLOUGH:** Your Honor, the only thing I would
20 add is that it appears to me that as you're interpreting the
21 facts, that you are viewing this as a broad and wide-ranging
22 conspiracy both in terms of the amount of time that the
23 conspiracy covered as well as the amount of products and money
24 that this conspiracy covered.

25 And so with that in mind, I think, as my co-counsel said,

1 we reserve argument in terms of aligning where Mr. Morgovsky
2 falls in terms of the Sentencing Guidelines or whether an
3 upward departure is appropriate; but if that is the view with
4 which Your Honor is considering this, that certainly gives us
5 some --

6 **THE COURT:** But let me ask you about that. I mean,
7 you know, there's a dispute between the parties about whether
8 the conduct reaches back to 2008, and that dispute is couched
9 in discussion of what the appropriate criminal history should
10 be; right?

11 So I guess what I will ask you is, let's assume that I
12 resolve that dispute in Mr. Morgovsky's favor in the sense that
13 I put him in Criminal History Category I. At that point does
14 it -- how much does it matter how far the conspiracy went back,
15 how much product was involved?

16 I mean, we know that this is a significant crime that
17 Mr. Morgovsky -- these are significant crimes that
18 Mr. Morgovsky committed, serious crimes; and, you know, once
19 we've resolved the Criminal History Category question, I'm
20 wondering how much that matters afterwards.

21 **MR. McCULLOUGH:** As to what guidelines would be
22 appropriate, it is not -- it's not an issue. I mean, the
23 guidelines --

24 **THE COURT:** It would just be relevant to the 3553(a)
25 factors?

1 **MR. McCULLOUGH:** That is correct, Your Honor. And I
2 think it would be highly relevant if one were to look at the
3 extent of the criminal conduct here that's been shown through
4 the evidence that's been presented to Your Honor as we have
5 provided at an earlier motions hearing. As you know, we
6 presented documents dating back to the late 1990s involving
7 similar conduct, exporting this equipment. As Your Honor has
8 explained, that conduct appears to have gone unabated through
9 most of this time period of this conspiracy.

10 In addition, Your Honor --

11 **THE COURT:** But the guideline range is the guideline
12 range; right? So what you're saying is it wouldn't affect the
13 guideline range and that would -- and so it would primarily be
14 relevant to where Mr. Morgovsky was sentenced within the
15 guideline range; or potentially if the conduct was particularly
16 serious or particularly benign, I guess, within the range of
17 violations of these statutes, it might be relevant to whether
18 there should be an upward or downward variance.

19 **MR. McCULLOUGH:** I think that's -- I think that's
20 right, Your Honor. And the other consideration here is, under
21 the 3553(a) factors, the consideration of actually whether any
22 of this -- whether the sentence will appropriately educate the
23 defendant as to the wrong -- his past wrongdoing.

24 And I think that that is -- I think when you view what may
25 be a misdemeanor in light of the overall course of conduct, I

1 think it is something that Your Honor should seriously consider
2 as to whether there is a -- there would be a risk of recidivism
3 with an unfortunate low sentence here.

4 **THE COURT:** Do you believe -- and, by the way, you
5 keep making reference to reserving discussion of where the
6 sentence should be within the guideline range until later. I
7 want to hear everything you have to say now.

8 So do you think there is any sentence that would -- you
9 made reference to educating the defendant, educating
10 Mr. Morgovsky. Do you believe that there's any sentence that
11 will educate Mr. Morgovsky that what he did was illegal and
12 that he shouldn't do it again?

13 **MR. SAMPSON:** Well, Your Honor, he certainly knew it
14 was illegal. There's plenty to show that he knew exactly what
15 law he was violating.

16 That said, I think it's a fair question. I am not sure
17 that any sentence is going to bring home the message that it's
18 something he couldn't do again if he thought he could get away
19 with it.

20 That said, Your Honor, in terms -- setting aside criminal
21 history, in terms of where Mr. Morgovsky's sentence should fall
22 within the guidelines, there is -- this is an exceptionally
23 egregious case in terms of willfulness. Essentially it's a 10
24 out of 10 on willfulness. He knew exactly what the law is. He
25 had studied it. He had apparently assisted another person who

1 was charged with exporting night vision to Russia with his
2 criminal defense; and so Mr. Morgovsky absolutely knew the
3 risks he was taking, including with his wife, and he took them.

4 And so, Your Honor, for those reasons I'm not sure that a
5 departure or variance upward would be appropriate. We're
6 asking only for a sentence at the top of the guidelines to
7 reflect the length of the conspiracy, the scope, the number of
8 tubes and lenses, the country, the destination, the potential
9 harm to the United States national security; and all those
10 matters reflect that a high-end guideline sentence is entirely
11 appropriate in this case.

12 **THE COURT:** When you say country of destination, one
13 of the points that Mr. Morgovsky made a number of times is that
14 Russia had most-favored nation status for most, if not all, of
15 the time that he was exporting these products to Russia.

16 **MR. SAMPSON:** I'm not aware of any difference that
17 that makes in terms of the licensing requirements for --

18 **THE COURT:** Well, but you make reference to the
19 country of destination.

20 **MR. SAMPSON:** Well --

21 **THE COURT:** That's why I was asking. Legally I don't
22 think it matters.

23 **MR. SAMPSON:** Sure.

24 **THE COURT:** But you were the one who invoked the fact
25 that he sent this stuff to Russia.

MR. McCULLOUGH: Your Honor, to put a finer point on it, the evidence that's been presented to Your Honor demonstrates that Mr. Morgovsky was providing these materials to the Russian military, to the Russian government. That was the intent of his conspiratorial scheme.

And in addition to sending it to Russia, which is a clear violation of the statute itself, the intended recipient of the controlled items is --

THE COURT: Can you point me to -- in the materials that you submitted before Friday night -- and, again, I haven't reviewed whatever you submitted Friday night -- point me to the material that you say stands for the -- proves that Mr. Morgovsky intended to send these materials to the Russian military.

MR. McCULLOUGH: Your Honor, Exhibit 1 of our filing on -- which number is this?

MR. SAMPSON: 329.

MR. McCULLOUGH: -- ECF 329.

THE COURT: Okay. Wait. Hold on a second.

(Pause in proceedings.)

THE COURT: Okay. I have Exhibit 1.

MR. McCULLOUGH: This is a certificate from military testing of devices that were provided to the Russian military. These include Infratech thermal vision --

THE COURT: Wait. Hold on. Let me just sort that out

1 and get my bearings here.

2 **MR. McCULLOUGH:** Sure.

3 **THE COURT:** You said this is a certificate of testing
4 provided to the Russian military?

5 **MR. McCULLOUGH:** By the Russian military, Your Honor.

6 **THE COURT:** Okay. So this is a Russian military
7 document and it's a certificate of testing. It reflects that
8 night vision equipment was tested by the Russian military.

9 **MR. McCULLOUGH:** Both thermal and night vision
10 equipment were tested by the Russian military.

11 **THE COURT:** Okay.

12 **MR. McCULLOUGH:** These are the same products into
13 which we contend that Generation 3 image intensifier tubes were
14 placed with respect to night vision equipment --

15 **THE COURT:** Okay.

16 **MR. McCULLOUGH:** -- as well as the Janos lenses that
17 went into the thermal-imaging equipment.

18 **THE COURT:** Okay. But do you know that these were --
19 that it was Infratech that provided the particular equipment
20 that this document reflects was being tested by the Russian
21 military?

22 **MR. McCULLOUGH:** Your Honor, not with respect to the
23 particular items that are here.

24 **THE COURT:** In other words, we don't know whether the
25 Russian military got this equipment that is the subject of this

1 certificate from Infratech or somewhere else; is that right?

2 **MR. McCULLOUGH:** Your Honor, we know that it is --

3 these are Mr. Morgovsky -- the companies that Mr. Morgovsky is
4 affiliated with that were providing these items for testing to
5 the Russian military, Infratech and TPK Argus, its successor.

6 **THE COURT:** Right. Okay.

7 **MR. McCULLOUGH:** Your Honor, we have charged --

8 **THE COURT:** Okay. So where -- and so this certificate
9 does not prove that. So show me the evidence that proves that
10 Infratech and the other companies -- I want you to walk me
11 through all the evidence -- again, anything you submitted
12 before Friday night -- walk me through the evidence that shows
13 that Mr. Morgovsky intended for this equipment to be used by
14 the Russian military.

15 **MR. SAMPSON:** Your Honor, so as an initial matter,
16 Mr. Morgovsky was involved in discussions with I believe it was
17 Vadim Pavlov, who worked at Infratech in Moscow, over the
18 magazines that Infratech should advertise in. And in addition
19 to the magazine *Safari* --

20 **THE COURT:** Show me the evidence. First, point me to
21 a piece of evidence and then you can give me an explanation for
22 it.

23 **MR. SAMPSON:** Yes. Why doesn't Your Honor go to
24 Exhibit Number 5, which is an Infratech 406 brochure. It's
25 3291, page 26.

1 **THE COURT:** Page 26, okay.

2 **MR. SAMPSON:** Your Honor, and it's translated on --

3 **THE COURT:** Wait a minute. Hold on. Hold on. Hold
4 on. You have it all in one document so it's going to take me
5 awhile to evolve all your exhibits in one document here.

6 **MR. SAMPSON:** Sure.

7 **THE COURT:** Okay. All right.

8 **MR. SAMPSON:** Your Honor, this is an IT-406. The
9 first image is a soldier in a ghillie suit. On the next page
10 there's a Humvee, a tank, and a soldier all with -- all in the
11 crosshairs of these night vision scopes, Your Honor.

12 **THE COURT:** Okay.

13 **MR. SAMPSON:** The 406 in particular, if you keep going
14 to Exhibit Number 6, Your Honor --

15 **THE COURT:** What page is that?

16 **MR. SAMPSON:** That's two more pages -- three more
17 pages.

18 **THE COURT:** Okay.

19 **MR. SAMPSON:** Your Honor, this is the medium -- this
20 is the -- I believe it's the large scope that was seized from
21 Mr. Morgovsky's residence. You will see that that is a visual
22 match for the 406 scope that Infratech's brochure reflects,
23 Your Honor.

24 In addition, Special Agent Natalie Razai-Zadeh traveled to
25 Poland earlier this year as the Polish authorities were

1 executing a search warrant at the business of a man named
2 Henryk Cysewski (phonetic).

3 **THE COURT:** Is this in reference to some evidence that
4 you submitted --

5 **MR. SAMPSON:** Yes, Your Honor.

6 **THE COURT:** -- in connection with this sentencing
7 hearing?

8 **MR. SAMPSON:** So -- yes, Your Honor.

9 On page -- I believe it's on the next page there is an
10 image of an image intensifier tube. That is the controlled
11 item, Your Honor, that cannot be exported. So that is a
12 picture of the tube that came from the scope in Mr. Morgovsky's
13 residence.

14 Additionally, I will have to locate it here, but,
15 Your Honor, there was a scope seized by the Polish authorities
16 from an Infratech 406, the same scope we've been discussing,
17 that was in Poland. It was outside the United States. It had
18 a tube -- image intensifier tube in it that the serial number
19 had been scraped off.

20 The Polish authorities gave that to the United States. We
21 took it to the manufacturer Harris Corp. Harris Corp. looked
22 at it. They pulled it out. There's an internal serial number.

23 **THE COURT:** Okay. But is this in the evidence that
24 you've submitted --

25 **MR. SAMPSON:** Your Honor, I believe it is, and we've

walked through it in the brief.

THE COURT: -- in connection with the sentencing hearing?

I don't want to hear your narrative. I want to look at the evidence and I want to hear your explanation of the evidence that you've submitted.

MR. SAMPSON: Yes, Your Honor, I do believe that it is in here, and I will have to point it out to Your Honor.

There is -- there should be in here a certificate from Harris Corp. which authenticates that that tube was purchased by Night Vision Depot from Harris directly. Night Vision Depot is a middleman that Mr. Morgovsky purchased from.

We then have the invoice, which I believe is not from Friday's filing, I believe it's from the 5th, which states --

THE COURT: Show me. Show it to me.

MR. SAMPSON: I will. Okay.

(Pause in proceedings.)

MR. SAMPSON: Your Honor, so that's -- so, Your Honor,

THE COURT: Page what?

MR. SAMPSON: Page 23.

THE COURT: Okay.

MR. SAMPSON: -- should be the picture of the tube
4288 I believe it's 347.

THE COURT: Yes.

MR. SAMPSON: And on the next page is Harris Corp.'s analysis of that tube.

THE COURT: Okay.

MR. SAMPSON: Harris Corp. indicates that this is a tube that they sold to Night Vision Depot in June 2011.

THE COURT: Okay.

MR. SAMPSON: Now, I believe, and I'm looking for it now, Your Honor, the Government has also submitted it's Doc. 347, that's toward the end of that document, 347-1, page 43 of 44.

THE COURT: Wait. Hold on.

(Pause in proceedings.)

THE COURT: Page what?

MR. SAMPSON: 43 of 44.

THE COURT: Okay.

MR. SAMPSON: There's a highlighted serial number for a SLG9815, which is a controlled image intensifier tube, showing that Hitek International, Mr. Morgovsky's company, purchased it from Night Vision Depot along with about 30 other controlled image intensifier tubes.

So, Your Honor, the Government has shown that these tubes were actually exported and that they were found in Infratech night vision scopes, Your Honor.

Now, circling back to the Russian military --

THE COURT: Yeah, that's what I was going to ask.

MR. SAMPSON: -- back to Exhibit 1, Your Honor, the 406 is one of the items that was tested --

THE COURT: Wait. Hold on. I've got to go back to

(Pause in proceedings.)

THE COURT: Okay.

MR. SAMPSON: At the bottom of the list is night vision sight IT-406.

THE COURT: Okay.

MR. SAMPSON: So, Your Honor, Infratech is having the Russian military test these items in live-fire drills in 2015, and the 406 is made with image intensifier tubes that Mr. Morgovsky himself purchased here in the United States and which are controlled for export.

THE COURT: But how do we know -- forgive me. This might be an ignorant question. But how do we know that the 406 -- it seems like what you're saying is the night vision sight IT-406 ties back to the photos of the tubes that you were just showing me. Is that what you're saying?

MR. SAMPSON: Yes, Your Honor. It houses --

THE COURT: How do we know that? How do we know that?

MR. SAMPSON: One of the 406s, which was seized in Poland, was disassembled here in the United States and the manufacturer of the tube determined it was one that they had made.

1 **THE COURT:** Okay. But a night vision sight IT-406, is
2 that a -- I assume -- maybe this is incorrect but I assume that
3 there's not only one product that's called -- there's not only
4 one item that's called night vision sight IT-406 --

5 **MR. SAMPSON:** No.

6 **THE COURT:** -- that that is a description of a type
7 of --

8 **MR. SAMPSON:** It is a model.

9 **THE COURT:** It's a model; right?

10 **MR. SAMPSON:** Yes, Your Honor.

11 **THE COURT:** So how do we know that this model ties
12 back to the stuff that Mr. Morgovsky shipped?

13 **MR. SAMPSON:** It contained tubes that Mr. Morgovsky
14 had purchased.

15 **THE COURT:** Well, the particular ones that the Russian
16 military had?

17 **MR. SAMPSON:** No, Your Honor. We don't have that
18 evidence.

19 **THE COURT:** Okay. Just the product, the night vision
20 sight IT-406, Infratech had those. Mr. Morgovsky shipped tubes
21 that were used in those products, and then the Russian military
22 got night vision sight IT-406 products from Infratech?

23 **MR. SAMPSON:** They tested them, yes.

24 **THE COURT:** Tested them.

25 Okay. And then what about purchase or use? Is there any

1 evidence that the Russian military -- I mean, in the end I
2 don't know how much this matters for sentencing, I will tell
3 you, but since the assertion seems to be that Mr. Morgovsky
4 intended for this stuff to be used by the Russian military, I
5 want to drill down and see what your evidence is of that.

6 **MR. SAMPSON:** Yes, Your Honor. And I will say he
7 certainly wanted to sell this to whoever would buy it,
8 Your Honor. I'm not sure that he made a distinction between
9 selling it to the military, selling it to individual hunters.
10 This was an operation that made money. The military buys in
11 bulk.

12 **MR. McCULLOUGH:** And, Your Honor, I mean,
13 Mr. Morgovsky has -- the Government has alleged that
14 Mr. Morgovsky has engaged in a conspiracy to export these items
15 to Russia in furtherance of the Infratech and TPK Argus
16 business.

17 We have demonstrated that Mr. Morgovsky had correspondence
18 related to the testing of these devices by the Russian
19 military.

20 **THE COURT:** And where is that?

21 **MR. McCULLOUGH:** That is the Exhibit 1 that we --

22 **THE COURT:** Okay. So that was one thing that you
23 hadn't mentioned. So Exhibit 1 is -- this was in
24 Mr. Morgovsky's possession? This was seized from his computer
25 or something?

MR. McCULLOUGH: Correct.

THE COURT: Okay. Tell me where it was seized from.

Give me the details.

(Pause in proceedings.)

THE COURT: All right. Here's what I'm going to do.

I'm going to let you look for that while I turn to allow

Mr. Morgovsky's lawyers and Mr. Morgovsky, if he wishes, to say whatever they want to say.

But there has been a lot of noise about Russian military, Russian military; and when you read the Government's papers, it sounds like Mr. Morgovsky was plotting to send this stuff to the Russian military, and I didn't quite see that in the material that the Government submitted.

Certainly Mr. Morgovsky should have known that it could have been used by the Russian military at a minimum, but I didn't necessarily see in the materials that the Government submitted evidence from which you could draw a conclusion that Mr. Morgovsky specifically intended for these products to be used by the Russian military.

Again, we can have a discussion about how much that matters but, you know, that's -- you know, it's a significant allegation and one that, you know, we would want to look carefully at the evidence before we reached that conclusion.

So, in any event, what I'd like to do now is hear from the Defense on whatever the Defense wishes to present. I'll give

1 the Government a brief opportunity for rebuttal, and then I'll
2 hear from Mr. Morgovsky if he wishes to speak.

3 **MR. OSTERHOUDT:** Your Honor, may I ask Your Honor to
4 hear Mr. Ellis initially?

5 **THE COURT:** I'm happy to hear from anybody, yes.

6 **MR. ELLIS:** Your Honor, bear with me one second while
7 I pull up this case.

8 **THE COURT:** I'm sorry. I couldn't hear you. Could
9 you pull --

10 **MR. ELLIS:** Yes. Bear with me one second while I pull
11 up this case.

12 **THE COURT:** Oh, sure.

13 **MR. ELLIS:** Using an iPad is very new to me. I'm
14 from the old school.

15 **THE COURT:** Take your time.

16 **MR. ELLIS:** So I'll find it here in just one second,
17 please.

18 (Pause in proceedings.)

19 **MR. ELLIS:** Your Honor, I speak at this point not as a
20 representative for Mr. Morgovsky but, rather, as an officer of
21 the court. I'm concerned --

22 **THE COURT:** But you are representing Mr. Morgovsky.

23 **MR. ELLIS:** I am, yes.

24 **THE COURT:** Okay. I just wanted to make that clear.

25 **MR. ELLIS:** Yeah, but I -- I sat through the

1 proceedings last time where Mr. Osterhoudt moved to withdraw
2 and Mr. Morgovsky moved to discharge him, and I was concerned.

3 I know the Court found that Mr. Osterhoudt had provided
4 effective assistance of counsel, asked me if there was anything
5 that he may have left out. I pointed out disparity. The Court
6 continued the sentencing. We provided the disparity of
7 information.

8 But, even so, I just -- there's a Supreme Court case that
9 I think says unfortunately no harm, no foul, as they say in
10 basketball, doesn't really apply to this kind of case where
11 there's a right to counsel of your choice. And it's *U.S.*
12 *versus Gonzalez-Lopez*, 548 U.S. 140 2006, a Justice Scalia
13 opinion, wherein the defendant was denied the right to bring in
14 paid retained counsel of his choice. The case went to trial.

15 **THE COURT:** Okay. Well, you're hear representing
16 Mr. Morgovsky now as well; right?

17 **MR. ELLIS:** Yeah. Yeah. But I'll respond.

18 But essentially this case went to trial. The
19 court-appointed lawyer did a fine job, and the Government
20 argued harmless error. And Justice Scalia writing for the
21 court said there can be no harmless error, it's structural, and
22 he reversed the conviction, and it's pointed out to this Court.

23 **THE COURT:** I understand what you're saying, but we
24 had -- I actually continued -- first of all, this was a
25 sentencing hearing, not a trial.

1 **MR. ELLIS:** Yes.

2 **THE COURT:** Number two, I had an hour-long in camera
3 discussion with you-all about the nature of the apparent
4 conflict, and I continued the sentencing hearing and I gave
5 Mr. Morgovsky an opportunity to bring you in. So I think there
6 are a lot of differences between this case and that one. And I
7 also made a number of findings with respect to Mr. Morgovsky's
8 attempt to manipulate the proceedings, which I think make this
9 case different from that one as well.

10 So how would you like to help Mr. Morgovsky on his
11 sentencing hearing now?

12 **MR. ELLIS:** Oh, so I made my point regarding the
13 motions that were denied.

14 **THE COURT:** Okay.

15 **MR. ELLIS:** I just want to essentially renew those
16 motions --

17 **THE COURT:** Okay.

18 **MR. ELLIS:** -- and point that out for the record.

19 As far as sentencing, where is -- do you want -- I'll
20 address acceptance if I may, but --

21 **THE COURT:** Great.

22 **MR. ELLIS:** -- and disparity.

23 **THE COURT:** Do you want to go ahead and address it now
24 while you're up?

25 **MR. ELLIS:** Sure. Thank you.

1 Regarding acceptance of responsibility, I think I'd ask
2 the Court to defer ruling on that until you hear from
3 Mr. Morgovsky.

4 **THE COURT:** Which is why I said based on everything
5 I've seen so far, I don't believe that Mr. Morgovsky is
6 entitled to the reduction.

7 **MR. ELLIS:** I've learned over the past -- I've been
8 doing a series of articles for Law360. I've been interviewing
9 your colleagues around the country. I've done 30 interviews so
10 far, including Judge Breyer from this bench, who I know
11 Your Honor clerked for.

12 And one thing I'm hearing is that allocution is very
13 important, and judges want to see what's in a defendant's
14 heart. Has he gotten it? Has he internalized it? You know,
15 and that's probably the best way to determine whether the
16 defendant has indeed accepted responsibility.

17 So I would ask the Court to defer its ruling -- of course,
18 that's a tentative ruling I know -- until you hear from
19 Mr. Morgovsky.

20 Regarding the guidelines of 97 to 121 months, again, the
21 only difference I would have with that would be the acceptance
22 issue, which would lower the guidelines; but based on our
23 research, the median sentence and the average sentence for this
24 offense is 60 months, and anything over 60 months may very well
25 amount to a life sentence or a death sentence in prison for

1 Mr. Morgovsky due to his age and due to his health.

2 Just yesterday Mr. Morgovsky got some bad news. He went
3 to see his cardiologist. I have a copy of that report. I'm
4 not -- I'm handing a copy to the Government and to the Court.
5 I'm not a doctor. I didn't go to medical school. I was told
6 the definition of a lawyer is a Jewish boy that can't stand the
7 sight of blood so I didn't go to medical school, but it seems
8 to me he's in pretty bad shape and may need surgery. He needs
9 surgery.

10 And I think based on the data we supplied, that his life
11 expectancy is -- as an inmate, is at 74 years. So anything
12 over five years -- he's 69 now -- is going to essentially be a
13 life sentence.

14 I would also add that I do a lot of work with the Bureau
15 of Prisons regarding BOP issues --

16 **THE COURT:** I'm sorry, what?

17 **MR. ELLIS:** I do a lot of work with people who have an
18 issue with the Bureau of Prisons: Designation issues,
19 programming issues, disciplinary issues, whatever. So I've
20 learned a lot about the Bureau of Prisons in my years of
21 practice.

22 And I have at least five former relatively high-placed
23 retired BOP officials working as consultants for me. And one
24 of them gave me a report indicating that he believes that
25 Mr. Morgovsky will be designated to a low-level security prison

1 as opposed to a minimum security Federal Prison camp, and he
2 gave reasons why that I'm happy to share with the Court. But
3 he also told me in the memo what life would be like for an
4 elderly inmate at a low-level security prison.

5 And if I may, Your Honor --

6 (Pause in proceedings.)

7 **MR. ELLIS:** And if I may, Your Honor, this came from
8 Michael Henderson. Michael Henderson used to be the regional
9 designator for the western region when they had their offices
10 in Pleasanton. They've now moved to Dublin. Back then several
11 years ago designations were made by the regional offices. Now
12 it's all been centralized in Grand Prairie, Texas, in an outfit
13 called the Designation and Sentence Computation Center.

14 Mr. Henderson says that all prison settings, regardless of
15 security level, deprive an individual of privacy and a quiet
16 environment. However, in a minimum security setting, there is
17 more freedom of movement; for example, there are no cells or
18 locked secure rooms. Whereas, in a low-security prison, inmate
19 living quarters and movement is more controlled and restricted
20 and so there is even less privacy.

21 Additionally, minimum security prisons are not surrounded
22 by a perimeter security fence and so when an inmate has free
23 time, he can be in an outdoor environment that is open space.

24 Minimum security prisons do not house offenders who are
25 known to present any serious threat of violence or escape.

1 **THE COURT:** Could I ask you a quick question about
2 this?

3 **MR. ELLIS:** Yeah.

4 **THE COURT:** How is this relevant to the amount of time
5 Mr. Morgovsky is going to be sentenced?

6 **MR. ELLIS:** Oh, a very good question. The answer is I
7 think the Court needs to take into consideration the quality of
8 time.

9 **THE COURT:** So you're telling me that I should assume
10 that Mr. Morgovsky will not be in a minimum security facility;
11 I should assume he will be in a low-security facility?

12 **MR. ELLIS:** Yes.

13 **THE COURT:** And what's the basis for that,
14 particularly if I conclude that he's a Criminal History
15 Category I? On what basis would I -- should I be concerned
16 that Mr. Morgovsky will be in a low-security facility as
17 opposed to a minimum-security facility?

18 **MR. ELLIS:** There are two factors in the PSR. The
19 Court is right, the BOP largely relies on the Presentence
20 Report, any recommendations of the Court, and anything sent
21 along by the U.S. Marshal Service.

22 There are two factors, according to Mr. Henderson, that
23 could result in the BOP imposing a management variable of
24 greater security and they are, one, that Mr. Morgovsky was in
25 possession of a firearm that had been purchased illegally; that

1 law enforcement officers believe he has ties to Russian
2 organized crime; and that he has a history of sophisticated
3 international ties and finances. And they could be concerned
4 that if he was in an open-air facility where he was with no
5 fence, that he could escape, and that would be their concern.

6 And even though the Court may grant voluntary surrender,
7 as I hope you will, they themselves will make their own call on
8 that one.

9 Additionally, he may well be assigned a greater severity
10 public safety factor because the case is involving exporting
11 sophisticated weaponry, and that is classified as a greater
12 severity public safety, which excludes camp placement at any
13 time forever.

14 **THE COURT:** Okay.

15 **MR. ELLIS:** So I think considering his health, his
16 life expectancy, which we believe will be 74 years old, his
17 health, the life he's going to have in a low-security facility
18 with the younger inmates who may very well extort him, as they
19 typically do with inmates they think are -- have funds and
20 resources, I think it's going to be a very difficult thing and
21 it's going to probably hasten his death, and that goes along
22 with not imposing a sentence that is greater than necessary.

23 **THE COURT:** Mr. Osterhoudt?

24 **MR. ELLIS:** And lastly, Your Honor, as far as --

25 **THE COURT:** Oh. I'm sorry.

1 **MR. ELLIS:** We have one -- excuse me. A rabbi from
2 Mr. Morgovsky's congregation is here today and would like to
3 address the Court regarding his good deeds.

4 **MR. OSTERHOUDT:** Rabbi Margolin.

5 **THE COURT:** I've received numerous written submissions
6 from Mr. Morgovsky's friends and family. I don't think it's
7 appropriate to allow Mr. Morgovsky's friends and family to
8 stand up in his sentencing hearing and speak.

9 **MR. ELLIS:** Okay. I think that's all I have. Thank
10 you.

11 **MR. OSTERHOUDT:** Your Honor, since the matter of that
12 organized crime matter just came up, I wanted to specifically
13 object to and ask the Court to order stricken from the
14 Presentence Report the comment at paragraph 21 --

15 **THE COURT:** Let me go there. Hold on.

16 **MR. OSTERHOUDT:** -- where an FBI agent allegedly
17 states that he thinks Mr. Morgovsky may have ties to Russian
18 organized crime. There's no evidence of that.

19 **THE COURT:** Paragraph 21? I'm sorry. I'm not seeing
20 that in paragraph 21.

21 **MR. SAMPSON:** Your Honor, I believe that was removed
22 from the final PSR.

23 **THE PROBATION OFFICER:** That was in the draft.

24 **THE COURT:** Okay.

25 **MR. OSTERHOUDT:** All right. I thought that was still

1 referred to, but that's fine.

2 **THE COURT:** Perhaps that will help with the prison
3 designation issue that you're concerned with along with the
4 fact that assuming that I continue to believe that
5 Mr. Morgovsky should be designated Criminal History Category I.

6 Sorry. Continue.

7 **MR. OSTERHOUDT:** Thank you, Your Honor.

8 Well, I appreciate Your Honor has given Mr. Morgovsky
9 himself, as well as counsel, an opportunity to speak on his
10 behalf.

11 I really feel a responsibility and a need to do that
12 because I moved to withdraw from this case. He moved to
13 discharge me because we had disagreements that were fundamental
14 in our view regarding the conduct of the case; but I never
15 stopped for an instant admiring Mr. Morgovsky's kindness,
16 generosity, and the way he's affected his community and the
17 love that his family professes for him. Those things are
18 genuine. And I think that I respectfully ask the Court to give
19 them appropriate weight in this sentencing process.

20 Another thing is that I don't think one can begin to
21 evaluate this man without focusing on his beginnings and how he
22 got to where he is and how he became the person that he is.

23 As you know from the pleadings that have been filed and
24 from the PSR, Mr. Morgovsky was born in the Ukraine. He was
25 born in much poverty. He was born -- he witnessed the

1 disintegrating years of the Soviet system in the Ukraine. He
2 suffered mightily from the ravages of anti-Semitism, and the
3 Ukraine was absolutely known and -- absolutely known for this
4 quality, and it hurt him. It hurt him fundamentally, Judge. I
5 know that it did.

6 **THE COURT:** Could I ask a question about that?

7 **MR. OSTERHOUDT:** Yes.

8 **THE COURT:** I mean, I guess one of the things that has
9 confused me about this case is I take at face value what you
10 say about, you know, Mr. Morgovsky's suffering --

11 **MR. OSTERHOUDT:** Yes.

12 **THE COURT:** -- in his childhood at the hands of the
13 country to which he was shipping all these dangerous items, but
14 the question is: Why was he shipping all these dangerous items
15 to this country that subjected him to such a terrible
16 childhood?

17 **MR. OSTERHOUDT:** We have --

18 **THE COURT:** Why would you choose to engage in that
19 particular -- of all types of criminal conduct, why would you
20 choose to engage in that type of criminal conduct?

21 **MR. OSTERHOUDT:** I would distinguish between Ukraine
22 and even the Soviet Union as it existed. Mr. Morgovsky, the
23 great suffering that he suffered took place in Ukraine. That's
24 where his grandparents were murdered by Nazis in Kiev. His
25 grandparents were murdered by Nazis and he knew that.

1 And as he grew up in the Ukraine, he was bullied because
2 of his -- because he was Jewish, and he suffered injury as a
3 result, psychic injury that was deep; and when he began to --
4 he's an intelligent man -- apply his trade and become educated,
5 he found quota systems in force for Jews which would narrow his
6 opportunity, and it hurt him deeply.

7 I just say that, Your Honor, because I know it's true
8 because I know him. I've talked to him for a long time. There
9 are things about Mr. Morgovsky that are frustrating to people,
10 and how do you juxtapose the fact he engaged in conduct that is
11 unlawful against the fact that he's obviously a man of such
12 kindness and generosity in his private life and family affairs?

13 And I think there's a fundamental thing that happened to
14 him with respect to his relationship to the state, his
15 relationship to authority, and his relationship to compliance.

16 I don't say that to defend him legally. I do say that I
17 think it explains much of his conduct. When he went to Russia,
18 actually Russia was less discriminatory and he was able to get
19 more educational benefit there in the old Soviet Union, which
20 he deplored the system.

21 His problem with the Soviet Union, he deplored the system.
22 He thought that it was antihuman. He thought it had stifled
23 initiative. But he didn't feel the same kind of religious,
24 ethnic hatred that he had encountered in his growing period.
25 That's why he didn't have that attitude toward Russia

1 necessarily.

2 Now, you know, why he became involved in shipping these
3 goods to Russia is complicated. It's a long, complicated story
4 of his businesses, how he tried to sustain himself and his
5 family after the collapse of his closet business that you've
6 heard about and his beginnings in the night vision period.

7 And Russia was at that time a source and a producer of
8 these goods that he knew something about. He became involved
9 with people there not in the criminal sense, but he became
10 involved with what they were doing.

11 You know, you talk about PK Argus -- TPK Argus. That
12 company I think did have -- you know, seek to have Russian
13 connections, but that was after Infratech. They were a
14 successor to Infratech around 2014 or so when the thing was
15 complete, between 2012 and 2014.

16 Argus took over the assets of Infratech. Infratech when
17 it existed before that, I do not believe that it had the
18 capacity or the necessary licenses to deal with Russian
19 military. That's what Mr. Morgovsky always believed.

20 His association with Infratech was with Vadim Pavlov and
21 others there. He didn't have any kind of relationship that
22 would require that anything go to the military, and we believe
23 he didn't have anything to do with that.

24 But as far as Russia goes, he's shipping things that often
25 have many uses, and the manner in which these things are

1 categorized and designated as controlled items in this country
2 is not free from ambiguity. I'm not saying that to defend him.
3 I'm just saying it's the truth.

4 Often the system, the way it operates in practice is that
5 the manufacturer winds up designating itself something as
6 controlled; and in the large companies such as Harris or such
7 as the company manufacturing lenses, there's a very -- pressure
8 to make sure you don't make a mistake. If you have any
9 question, you designate it control. The system for getting
10 that reversed is complicated and difficult and cumbersome.

11 My only point here is that many of these lenses, like the
12 regulation governing lenses, says that they're controlled but
13 then it has a provision "except for normal commercial use."
14 And there is a large area of normal commercial use for these
15 kinds of lenses, even lenses that otherwise control.

16 And so what I'm trying to get to Your Honor, his shipments
17 to Russia -- when it became Russian, his shipments to Russia do
18 not necessarily indicate that he's trying to ship anything
19 dangerous or that he's trying to injure the United States,
20 which is his adopted country he loves.

21 He loves the United States. He's a naturalized citizen,
22 he and his wife, for many years. He wouldn't do anything
23 consciously to hurt this country. He wouldn't do it. That's
24 the way he feels. I've had hours of discussions with him where
25 we disagree about everything almost, but that is what he

1 absolutely states all the time.

2 He's fiercely patriotic towards this country. He never
3 thought and never intended to do anything that would harm this
4 country. And he for that reason, I guess, took it upon himself
5 to act with such kindness and such benevolence, such generosity
6 to people he could identify with who came here because they
7 didn't like the situation in which they were living, and they
8 needed a taste of freedom and they needed to, you know, fulfill
9 their hopes and dreams and have opportunity.

10 That's what he found here, Your Honor. That's what he
11 found here and that's what he wanted others to experience.
12 That's why he was as kind, as generous as he was.

13 He's not going to do this again. You know, he's 69 years
14 old. He's gone through the lash of this prosecution for how
15 long now? He's not going to ever do this again. He's not
16 going to touch this business.

17 And I sincerely ask that you consider a substantial
18 downward variance in the case, as would the probation officer I
19 think, so that he can live out his life and be with his
20 grandchildren.

21 You know, his daughter now is pregnant. She lost her
22 first child when she was pregnant, but now she -- live out his
23 life with his grandchildren. He's in ill health. He has
24 heart -- he has serious heart problems. He has other issues
25 that you've heard about. He's -- he is faced with an aging

1 situation in custody.

2 He's learned his lesson. He does accept responsibility in
3 his own way regardless -- it may be hard to see sometimes
4 because he's around the fuzzy edges of the case he'll argue,
5 "No, I didn't do that, but I did" -- but in the center of it
6 all he knows -- and he says that he's guilty, and he knows he
7 shouldn't do it and he won't do it anymore.

8 Because he only had one prior misdemeanor here, because he
9 learned his lesson, because he's been through this, because of
10 the support he has, I ask Your Honor to give him a chance, give
11 him a chance, give him a sentence that's substantially lower
12 than the guideline but a sentence that is still a shock to him,
13 a shock to him that he won't forget.

14 It will be a lesson, and then he'll emerge from it knowing
15 that he's been punished for his conduct but still an
16 opportunity to live his life among the people he loves. That's
17 what I would say.

18 **THE COURT:** You know, one more question I guess I have
19 for you is you reference the people he loves. I mean, one of
20 the people he loves is his wife. How could he have done this
21 to his wife?

22 **MR. OSTERHOUDT:** Well, you saw --

23 **THE COURT:** How could you do that to somebody you
24 love?

25 **MR. OSTERHOUDT:** Well, his remorse is profound, and

1 you saw the things he filed before you in an effort to drive
2 that point home, and the way he pled guilty when he did and the
3 way that he did on the eve of trial or in trial.

4 He can answer it more clearly maybe and he'll have an
5 opportunity to speak to Your Honor I know, but I know the
6 remorse and grief he felt about that and guilt and
7 responsibility, and he's tried to make it right. He's tried to
8 tell anyone who would listen that it was him that was
9 responsible for that, and he's sorry.

10 And his wife, I think, clearly forgives him in the sense
11 that their love has persisted and it's real love between these
12 two people.

13 If you read all these e-mails, the Government was looking
14 for, you know, incriminating e-mails, but a lot of it is just
15 love expressed electronically between them, and that still
16 exists.

17 So I think in answer to Your Honor's question, it's a
18 legitimate question, but I think that, you know, Mr. and
19 Mrs. Morgovsky had an opportunity to work this out, and I think
20 she accepts his contrition and grief and wants him in her life
21 anyway.

22 **THE COURT:** Okay. Is there anything the Government
23 would like to wrap up on or respond to?

24 **MR. McCULLOUGH:** Your Honor, on the point of a
25 possible downward variance, I think a downward variance would

1 basically demonstrate to not only Mr. Morgovsky but others in
2 the night vision industry that exporting night vision
3 technology is simply a cost of doing business and that it is
4 worth a gamble if one sees a financial upside to it.

5 As to whether these items and Mr. Morgovsky was aware that
6 these items had an intended use that could harm other people,
7 we turn you simply to Exhibits 2 and 5, which identified the
8 Infratech scopes IT-404 and IT-406, both of which we've
9 previously discussed here.

10 Turning to page 16, Your Honor --

11 **THE COURT:** Of?

12 **MR. McCULLOUGH:** -- of 329-1, the exhibits.

13 **THE COURT:** Okay.

14 **MR. McCULLOUGH:** (reading)

15 "Distinctive Features: Shock-proof design" --

16 "Shock-proof scope design to withstand recoil force of the
17 highest caliber weapons."

18 If one turns back simply two pages, one sees the IT-404
19 mounted on what appears to be a high-caliber weapon.

20 I think, Your Honor, there is -- the suggestion that the
21 image intensifier tubes have a variety of uses that may be
22 simply benign is hard to -- it's hard to support given the
23 evidence in this case.

24 **THE COURT:** Okay. Anything further?

25 **MR. SAMPSON:** Very briefly, Your Honor, regarding

1 acceptance.

2 I think the Court would be hard-pressed to find in all of
3 the many statements that Mr. Morgovsky has submitted a
4 statement complying with the guideline for an acceptance of
5 responsibility, Your Honor, which is a clear demonstration of
6 acceptance of responsibility, Your Honor, and it specifically
7 excludes false and frivolous denials.

8 Mr. Osterhoudt is correct that Mr. Morgovsky, as he has a
9 right to do, has attempted in every respect to chip away at the
10 edges of the case, relevant conduct, criminal history, and
11 other things, which he has an absolute right to do; but,
12 Your Honor, what he doesn't have a right to do is to falsely
13 deny what he did, and there is really no statement from him --
14 other than statements about managing his wife, there's really
15 no statements from him about how he actually accomplished the
16 crimes he pled guilty to.

17 In fact, he said he never used a false identification for
18 any of these crimes. Well, the Gary Piper account proves
19 that's false.

20 And in addition, Your Honor, there's no statements about,
21 and he's not required to do it, but if he wants acceptance,
22 there's no statements about how he actually accomplished the
23 export of the thousand-plus tubes and lenses that he purchased.

24 And so, Your Honor, I think the Court is well-supported in
25 its finding that there's no acceptance in this case.

1 **THE COURT:** Okay.

2 **MR. OSTERHOUDT:** Your Honor, he has accepted
3 responsibility. He says so in a lot of different ways to the
4 Court. It's his nature to disagree with things that were said
5 when he doesn't believe they're true.

6 For example, I think that based on my contacts with him,
7 if the Court is going to consider the business of Russian
8 military, that should be the subject of an evidentiary hearing
9 devoted only to that because he denies vehemently any such
10 intention. I urge you not to consider it or if you were to do
11 so, to have an evidentiary hearing directed simply to that
12 matter.

13 The other thing I wanted to say, Your Honor, is that
14 deterrence, you know, a sentence of -- a 48 months sentence,
15 let's say, to a 69-year-old man is a very noticeable and very
16 convincing admonition to people who might be inclined to do the
17 same thing. It doesn't have to be a life-crushing sentence of
18 years and years and years to have that resolved.

19 And I think, as Mr. Ellis has pointed out in filings of
20 comparative cases, I think judges have kind of seen that. And
21 even though these are serious offenses, the average that's been
22 given out is substantially lower than anything we're discussing
23 here. It's actually 60 months. 60 months.

24 But even that, I just think if you were to impose a
25 48-month sentence to Mr. -- I mean, he has -- he would have

1 suffered a great disability. He would be separated from family
2 for that period of time. He would lose the freedom that he
3 obviously loves to indulge. He would lose his opportunities to
4 do so many things in his life. He wouldn't see that -- his
5 family, his grandchildren during that period.

6 It would be a very strong incentive -- disincentive for
7 anybody else to follow his path; and, yet, it would allow him
8 the ability to live, allow him the ability to get out and prove
9 to this Court and the Government and everyone that he realizes
10 the error of his ways and he's not going to do this again.

11 **THE COURT:** I'm going to ask you -- could I ask you
12 one other question --

13 **MR. OSTERHOUDT:** Of course.

14 **THE COURT:** -- issue that we haven't covered yet,
15 which is the fine?

16 You heard me during Mrs. Morgovsky's sentencing hearing
17 and you heard me during Mr. Morgovsky's sentencing hearing last
18 time that we continued to today. I am not at all convinced
19 that Mr. Morgovsky lacks the ability to pay a fine, nor am I
20 convinced that Mr. Morgovsky will lack the ability to pay a
21 fine in the future given his level of intelligence and his
22 level of education.

23 And so, you know, my inclination would be to disagree with
24 the Probation Office that Mr. Morgovsky lacks the ability to
25 pay a fine and disagree with the recommendation to waive the

1 fine and to impose a fine sort of commensurate with where the
2 sentence comes out on the guidelines.

3 Do you want to -- does anybody want to address that before
4 I turn to Mr. Morgovsky?

5 **MR. ELLIS:** I would, yes.

6 In our recommendations to the Court, we recommended 48
7 months plus supervised release with the special condition of an
8 additional one year of home confinement, and we took no
9 position on the fine. That's up to the Court.

10 **THE COURT:** Okay.

11 **MR. OSTERHOUDT:** The other thing I would say,
12 Your Honor, is I don't think any fine should be based on a
13 finding that he's hiding assets because I don't think there's
14 evidence of that. I don't think that --

15 **THE COURT:** Well, I mean, it's either way. It's that
16 he -- even if he lacks the ability to pay now, he's not, it
17 seems to me, not likely to lack the ability to pay in the
18 future.

19 **MR. OSTERHOUDT:** I understand. I just didn't like
20 that implication that he's doing that.

21 **THE COURT:** And then one other question since you
22 mentioned supervised release. Maybe this is a question for
23 Probation.

24 My understanding, correct me if I'm wrong, my
25 understanding is that each count carries with it a maximum

1 three-year term of supervised release and that those terms of
2 supervised release cannot be consecutive. They have to be
3 concurrent.

4 **THE PROBATION OFFICER:** They must be concurrent.

5 **THE COURT:** So the maximum amount of supervised
6 release there could be in this case is three years.

7 **THE PROBATION OFFICER:** Correct, Your Honor.

8 **THE COURT:** Okay.

9 And, now, before I turn to Mr. Morgovsky, is there
10 anything else that you wish to add?

11 **THE PROBATION OFFICER:** No, Your Honor.

12 **THE COURT:** Okay.

13 All right. Mr. Morgovsky, now is the time in your
14 sentencing hearing where you have the opportunity to speak.
15 It's not a requirement and there's no penalty if you prefer not
16 to speak, but you have the right to do so and if you wish to do
17 so, now is the time.

18 **THE DEFENDANT:** Thank you.

19 **THE COURT:** And if you could please move closer to the
20 microphone.

21 **THE DEFENDANT:** Your Honor, as Mr. Osterhoudt said, I
22 have a tendency to -- when I disagree with something, I have a
23 tendency to argue that point; and I've been advised by my
24 attorneys under no circumstances to do it in speaking to you
25 because it would be interpreted as my lack of contrition and

1 lack of acceptance of responsibility and that I should just
2 say, "Yes, I'm guilty. I'm remorseful." Nothing else.

3 Some issues came up in the colloquy between you and the
4 Government and my attorneys where I sensed that there were some
5 things you would like to hear, some things you were -- you may
6 be unaware of, and I would like to do something unusual and ask
7 you a question.

8 Would you like me to give you a short version of my speech
9 or would you like me to elaborate on those things which were
10 discussed?

11 **THE COURT:** Mr. Morgovsky, you are entitled to say as
12 little or as much as you like at this sentencing hearing.

13 **THE DEFENDANT:** I understand.

14 First I would like to say that I pleaded guilty to
15 violating the Arms Exports Control Act and the two counts of
16 money laundering, and at no point I have done or said anything
17 which would contradict that I admit that I'm guilty of those
18 crimes.

19 Not only that I admit that I'm guilty of those crimes, but
20 I believe that I should be punished for those crimes and that I
21 have no excuse for doing so. I'm not asking to be forgiven for
22 that.

23 It has been very difficult time for everybody around me,
24 and I'm not talking about myself. I always care about other
25 people around me, and it's impossible to imagine that I would

1 ever do something like this again.

2 If I say I am sorry for what I've done, it will not even
3 begin to express what I feel -- how terrible I feel about what
4 I've done, what damage I inflicted on my family, my friends,
5 and families of my friends, which has been just enormous.

6 I would like to point out to the Court that I withdrew
7 from the conspiracy years before I was arrested. The
8 Government claims that after that, I manufactured things in
9 Russia for Russian military and I didn't need to export
10 anything, which, you know, this notion is just -- you know, I
11 can't even explain how wrong it is.

12 In any event, I am so sorry and so remorseful, and I would
13 like to apologize to the Court, to my family, to my friends,
14 and to the Government for committing those crimes. I
15 understand that an apology may be empty word, but this apology
16 comes from the bottom of my heart.

17 I have been -- since my arrest, it has been over two
18 years. These two years have been hell for me, for my family,
19 and everybody around me, and it is not possible for anybody
20 under this pressure and under these circumstances to even think
21 about doing something like this again or ever doing something
22 criminal again, and I certainly don't intend to do it.

23 I immigrated to the United -- I hated the Soviet regime as
24 Mr. Osterhoudt said, and I -- from my childhood, and I was
25 fortunate enough to immigrate to the United States and be

1 accepted as a refugee in 1979.

2 After working for -- after washing dishes in Chinese
3 restaurant and working for large corporations, I started my own
4 business out of my garage; and for 20 years I conducted very
5 legitimate business, serviced many customers, serviced them to
6 death. There was not a customer who was not thrilled with my
7 product and service.

8 And when my business -- during those years, I -- every
9 waking moment of my life, I was doing whatever I could to help
10 other people. My main mission in life has been to help other
11 people.

12 And my business was actually built on that premise and not
13 making a profit. I generally don't care about money, and my
14 business was a vehicle to help other people to find place in
15 life.

16 **THE COURT:** Mr. Morgovsky, I have a suggestion for
17 you. Maybe move a little bit back from the microphone --

18 **THE DEFENDANT:** Okay.

19 **THE COURT:** -- so that we can hear you a little bit
20 better.

21 **THE DEFENDANT:** Yes. Can you hear me?

22 **THE COURT:** Yes. That's fine. It's just it was
23 popping because you were so close to the microphone.

24 **THE DEFENDANT:** Okay.

25 It was not the only reason why my business failed, but I

1 just extended the ability to work with so many people with so
2 many problems that my business was not profitable.

3 I also had a family dispute which resulted in huge
4 financial losses. As a result, at some point it would be wise
5 for me to close the business and just move on.

6 The thought of all those people losing their jobs and not
7 being able to find another one, it was unbearable to me, and I
8 struggled for a number of years trying to save the business. I
9 couldn't save the business just, you know, in its regular
10 course; and I made a number of very bad, very wrong, boring
11 decisions, very reckless, boring decisions, which, when I was
12 unable to meet them, posed a danger to my life, to the life --
13 not only my life but the life of my wife.

14 I found a way to obtain new identities for me and my wife,
15 which was totally unrelated to night vision business, and for a
16 number of years we were hiding from the danger. It actually
17 was resolved eventually in the early 2010, after which I admit
18 I occasionally used another name and accounts in another name;
19 but from that point on, we lived under our own names and just
20 nothing was done after that time in any way other than
21 occasional use of that identity, which I totally consider
22 improper.

23 So this false identity business was only connected to the
24 danger to our lives and nothing else. As a matter of fact,
25 when I was convicted of a misdemeanor in 2008, I cooperated --

1 I assisted the Department of State to close the loophole I used
2 to obtain those identities. I explained to them what I did and
3 how to prevent it in the future. So it's no longer possible
4 for anybody to do what I did, and Department of State was
5 actually very grateful to me for that because they said it was
6 very important for them to close that loophole.

7 So the notion that I somehow can go ahead and just obtain
8 another identity and flee not only is something which I would
9 not do, I've been extremely compliant with Pretrial. I've been
10 just following every rule. And during this over two years,
11 I've demonstrated that I'm not a flight risk.

12 And Pretrial actually on their own initiative established
13 a curfew for me, and they recently asked for me to be removed
14 from monitoring at all, and I actually told them that I don't
15 request that. If they want to do it on their own initiative,
16 they could do it, but I told them that I would prefer to be on
17 monitoring in order to just for nobody to think that I'm a
18 flight risk.

19 During the time which I have been on curfew, I actually
20 have gone out very little. I've been in prison in my home. I
21 imprisoned myself in my home. I had no desire to go somewhere,
22 to come out. I just have been -- I put myself in a cocoon just
23 filled with remorse.

24 I have not conducted any social life. I've practically
25 not gone out, and I confine myself to sort of I started

1 inflicting punishment on myself even before the real punishment
2 started.

3 After making those terrible, reckless, boring decisions, I
4 became very desperate and at some point I started violating
5 export laws in order to solve those financial problems out of
6 desperation.

7 As time went by, I became more and more terrified by what
8 I was doing, but I can say with complete confidence that I've
9 always loved this country. I've always helped other people to
10 realize how great this country is. I would never do anything
11 to harm this country or national security.

12 And one of the excuses I gave to myself, which, of course,
13 was a lame excuse, that I was -- it was a victimless crime and
14 I was not doing any harm to anybody because whatever I provided
15 to Infratech was being used for hunters and Infratech had no
16 connection with Russian military. It was not licensed to
17 provide anything to Russian military, and actually Russian
18 military does not allow components like this to be provided to
19 it in whatever is provided to Russian military because in
20 Russia they have their own products and actually
21 high-performance products, which are completely comparable to
22 those which are listed in the Indictment.

23 As a matter of fact, the Government mentioned that it was
24 designed for high-caliber weapons. In Russia hunters use
25 high-caliber rifles or shotguns unlike hunters in the

1 United States. So in Russia it's more important for hunters to
2 have night vision equipment to withstand high-caliber than it
3 is in the United States.

4 In fact, in Russia, they made those image -- third
5 generation image intensifiers specifically designed to
6 withstand impact. And in the United States, those tubes which
7 are listed in the Indictment are not designed to withstand high
8 caliber. So actually it would be against -- against technical
9 rules and common sense to use U.S. tubes for high-caliber
10 weapons as the Government suggested.

11 Aside from that, whatever testing the Government is
12 talking about, whatever connections with the Russian military
13 the Government is talking about occurred after Infratech was
14 acquired by TPK Argus and after TPK Argus applied for a license
15 to do business with Russian military, which was at the time
16 when I was no longer exporting any of those items.

17 As a matter of fact, when I saw the light at the end of
18 tunnel in resolving my financial problems and actually I
19 guaranteed some loans, which were made by people who could not
20 be -- not be repaid, as soon as I saw the light at the end of
21 the tunnel, I immediately withdrew from the conspiracy and I
22 stopped buying those tubes at all, I stopped buying those
23 lenses at all.

24 And when the Government talks about Russian military,
25 whatever events the Government is talking about occurred

1 totally after the time when I -- not only I stopped exporting
2 those things but I stopped buying them. Okay. So it was
3 impossible for me to actually supply them.

4 The Government claims that those whatever model numbers
5 and whatever tube they saw inserted in that model number show
6 that those models must have American-made tubes. Any night
7 vision scope can house any tube made worldwide by many
8 different countries because those tubes are of the same size.
9 They have standard size so it can house a Russian-made tube,
10 second generation, third generation; American-made, second
11 generation, third generation; Indian made; German made; French
12 made; Chinese made; Japanese made. It would all be the same
13 model number of scope but it would have a different tube. So
14 it's impossible for somebody to say, "Oh, this model number has
15 a tube exported by Mr. Morgovsky." Okay?

16 The Government mentioned -- referenced a 2011 -- two
17 purchases by me in 2011, and they claim that it's proof that in
18 2015 Russian military was testing a scope or scopes which must
19 have contained those tubes; but in 2015 or long time before
20 that, I was not even in a position to supply those tubes
21 because I didn't buy them.

22 Aside from that, under no circumstances I would ever, ever
23 do anything which would be against the interests of the
24 United States. The excuse I have given myself that it was
25 going to hunters and there was no victim is not a valid excuse

1 for my violation of export laws, but I really -- even the
2 thought that somebody thinks that I did something to harm this
3 great country, which I really just love and admire, is really
4 the most upsetting thing in this for me. It's more upsetting
5 for me than potential punishment.

6 Aside from that, my father died when he was 54 years old
7 when I was not 17 yet. He had the same health problems I have
8 now. I've outlived him now by over 15 years. If I remained in
9 the Ukraine, I would probably be dead by now.

10 I'm not afraid of death and I'm not afraid of dying in
11 prison. The only concern I have is for my wife and my daughter
12 and other members of my family.

13 The report, which my attorney handed to you, was given to
14 me by my cardiologist yesterday. On October 31 when my wife
15 was sentenced, I was still wearing a patch which monitored my
16 heart rate and regularity of my heartbeat. After I stopped
17 wearing it, my cardiologist sent it for evaluation and then he
18 received the results of the evaluation yesterday.

19 The progress report which was given to you shows that
20 25 percent of the time I have irregular heart rate and that my
21 heartbeat goes as high as 208 beats a minute. The normal heart
22 rate is 60.

23 There are studies showing that the life expectancy is
24 inversely proportional to the heart rate. The higher the heart
25 rate, the shorter the lifespan.

1 My heart rate reaching 208 beats a minute is extremely
2 high, and it means that my life expectancy is very short and I
3 don't expect to outlive my father for much longer. So possibly
4 any sentence, no matter how long it will be, may end up being a
5 life sentence.

6 Do I want to have a life sentence? No. Do I accept it?
7 Yes. I hope it will not affect my family to a large degree
8 because I myself, I'm at peace with that.

9 My cardiologist said yesterday that in order to -- and not
10 only yesterday but before, that irregular heart rate often
11 results in a stroke and that's how my father died actually. He
12 had the same heart problems and then he died of a stroke.

13 He says that a way to attempt preventing a stroke when you
14 have irregular heartbeat is to take, like, blood thinners that
15 he prescribed to me. But as he reflected in the report that
16 was given to you, if I take blood thinners, it causes my ulcer
17 to bleed. So my doctor believes that taking blood thinners
18 causes significant -- can cause significant problems with my
19 ulcer and not taking them cause -- presents a potential of a
20 stroke.

21 So he recommends to do a surgical procedure in which -- I
22 think it's called ablation -- in order to try to get rid of
23 irregular heartbeat altogether, and he referred me to a
24 specialist in that regard.

25 I would like to have an opportunity to at least remove

1 that -- at least that one obstacle which can possibly be
2 removed. I don't know if I can do much about my increased
3 heartbeat, though I'm taking medications for it but they are
4 not working too well so far; but at least trying to get rid of
5 that atrial fibrillation, irregular heartbeat, will be -- would
6 help to prevent a stroke and would not impose a danger for my
7 ulcer.

8 As far as my ulcer is concerned, when I was arrested and
9 spent five days in jail, I was shortly hospitalized on
10 emergency basis with bleeding ulcer with blood coming out of my
11 mouth and severe atrial fibrillation. So if it happened after
12 five days, I can imagine what can happen after 10 years, and I
13 don't believe that I can survive 10 years or close to that
14 anywhere. And I don't believe I can survive 10 years even if
15 I'm not in prison.

16 So I prefer that I'm not given a life sentence. I would
17 be in peace with this if I will. I deserve to be punished. I
18 hope I will not be punished excessively.

19 My only hope -- I'm not planning to -- I mean, based on
20 whatever happened to me and whatever happened to others in this
21 entire process, I cannot imagine that I would do anything
22 illegal ever again.

23 I would like to stress the fact that I withdrew from that
24 conspiracy years before I was arrested. So why would I
25 reoffend if I withdrew from the conspiracy before I knew that I

1 would be caught? It came from my personal decision, not from
2 law enforcement, to withdraw from the conspiracy.

3 At this point the only thing I hope that will happen to me
4 is that at some point I will still have a few years left to
5 spend with my family and with my grandchild or grandchildren,
6 who are not yet born, and with my grandchildren from my
7 stepson's side who are two boys whom I love dearly.

8 So my hope is that the sentence imposed on me considering
9 the problems -- my health problems and my age, that the
10 sentence imposed on me will not be a life sentence and I will
11 have a few years left. If not, sobeit.

12 Thank you very much. I appreciate you giving me the
13 opportunity to speak to you.

14 **THE COURT:** Thank you.

15 Mr. Ellis, were you trying to say something?

16 **MR. ELLIS:** Yes, Your Honor. Some housekeeping here.

17 Your Honor, I have the final PSR in front of me.

18 Page 10 --

19 **THE CLERK:** Sir, could you please speak in the
20 microphone?

21 **MR. ELLIS:** Yes.

22 Your Honor, I have the final PSR in front of me and
23 page 10, paragraph 2, states --

24 **THE COURT:** Paragraph 2?

25 **MR. ELLIS:** Yeah. Paragraph 22.

1 **THE COURT:** Okay.

2 **MR. ELLIS:** -- includes the organized crime reference

3 (reading) :

4 "The agent stated Naum Morgovsky is not an active
5 member of a gang but agents believe he may have ties to
6 Russian organized crime."

7 **THE COURT:** Any objection to removing that sentence?

8 **MR. SAMPSON:** No, Your Honor. We didn't object in the
9 papers.

10 **THE COURT:** Okay. I'll order that stricken.

11 **MR. ELLIS:** And may I, if I may, sum up?

12 If the Court grants Mr. Morgovsky acceptance of
13 responsibility, and I think if there is a close call, I think
14 the Court should give him the benefit of the doubt, you've
15 heard him today, that would give him a guidelines from 78 to 97
16 months.

17 The median sentence imposed on similarly situated
18 offenders is about 60 months. These people are average 44.9
19 years or 55 -- 40 -- they're 50 years old. He's got -- 50
20 years old. He's got 24 years on these people if my
21 calculations are right.

22 I really do believe that even a five-year sentence would
23 be a death sentence, which is why we proposed four years plus
24 one year of home confinement as a condition of supervised
25 release.

1 Now, I know the Government made much about the fact that
2 they said he was looking at perhaps an additional two years
3 consecutive with the aggravated identity theft; but, as a
4 practical matter, everyone knows that in federal court
5 93 percent of the people plead guilty and of those who go to
6 trial, the Government wins anywhere from two thirds to three
7 quarters of the cases.

8 So it's often said, if you're charged by the Feds, you've
9 got a 99 percent chance of winding up in front of a sentencing
10 judge.

11 So all this means is that he's probably looking at -- if
12 you give him four years plus a year supervised -- a year of
13 home confinement as a condition of supervised release, he's
14 also looking at two more years with the aggravated identity
15 theft. That's a long time. He may not make it.

16 **THE COURT:** All right. Obviously this is a pretty
17 complicated matter, and so first let me talk about the
18 guideline calculation and the PSR.

19 I believe -- I think it's a very close question. I think
20 that the Government could have gotten a four-level enhancement.
21 I think that it's -- you know, there is a reasonable argument
22 for the three-level enhancement. I think there is a reasonable
23 argument that one -- even though it might not -- it might not
24 specifically affect the guideline calculation, I think there's
25 a reasonable argument that Mr. Morgovsky intended to -- knew

1 full well and intended for these arms to reach the hands of the
2 Russian military.

3 But I think that, you know, the record on all of these
4 issues is murky enough that it is appropriate to sort of
5 resolve the tie in favor of the defendant, if you will.

6 And so I am going to stick with the guideline calculation
7 that we discussed at the outset, which is a base Offense Level
8 of 26, a two-point increase for the 1956 conviction, a
9 two-level increase for the role in the offense as Mr. Morgovsky
10 has argued for.

11 I continue to believe that Mr. Morgovsky is not entitled
12 to a reduction for acceptance of responsibility. I think there
13 is an argument that some of Mr. Morgovsky's comments today sort
14 of reinforce the idea that he has not adequately accepted
15 responsibility.

16 I further think that, to the extent that his comments
17 reflect an acceptance or that the words that he uttered suggest
18 an acceptance of responsibility, it's too little too late, it's
19 too contrary to Mr. Morgovsky's conduct throughout this case,
20 and I do not believe -- I believe that Mr. Morgovsky either
21 thinks that he didn't do anything wrong or thinks that he can
22 get away with doing wrong whenever he wants.

23 And so I do not believe that Mr. Morgovsky is entitled to
24 a reduction for acceptance of responsibility. That leaves us
25 at an Offense Level of 30.

1 I am, again, sort of -- I think the evidence is almost in
2 equipoise about this, so I'm going to, again, rule in favor of
3 Mr. Morgovsky on the issue of criminal history. I'm going to
4 put him in a Criminal History Category I. And so that leaves
5 us at 30 and that leaves us with a guideline range of 97 months
6 to 121 months.

7 I've stricken the provision from the PSR that references
8 ties to organized crime. Other than that and other than what
9 I've said here just now, I'll adopt the Presentence Report.

10 So now the question is we have a sentencing guideline
11 range of 97 months to 121 months, and we have to apply the
12 factors under the sentencing statute, Section 3553(a), and
13 decide whether this guideline sentence is -- a guideline
14 sentence is an appropriate sentence or something higher than
15 the guideline range or something lower than the guideline
16 range. And think when you apply all of the 3553(a) factors,
17 some cut one direction, some cut the other direction.

18 I understand the arguments about Mr. Morgovsky's age and
19 his health on the one hand, and they do cut in the direction of
20 a lower sentence.

21 I will assume for purposes of this discussion that
22 Mr. Morgovsky did not specifically intend to send arms to the
23 Russian military. How much that matters, I'm not sure, because
24 anybody who is involved in this should know of the significant
25 likelihood that these materials would end up in the hands of

1 the Russian military.

2 But to the extent that specific intent matters, I'm going
3 to assume for the purposes of discussion that Mr. Morgovsky
4 didn't intend to help the Russian military.

5 Nonetheless, on the other hand -- oh, I'll say one other
6 thing.

7 I considered all of the arguments about sentencing
8 disparity and the Government's presentation and Mr. Morgovsky's
9 presentation, and I'm left to conclude that on the facts of
10 this case, a guideline sentence would not result in an
11 unwarranted sentencing disparity.

12 All of that said, in the end, Mr. Morgovsky was exporting
13 arms to Russia. He knew he was exporting arms to Russia. He
14 concealed his operation exporting arms to Russia, he laundered
15 money from his operation, and he has continued to fail to
16 adequately accept responsibility for this very serious crime
17 that he's engaged in.

18 General deterrence is an important factor here. As the
19 Government said, people who export night vision products and
20 other arms to countries like Russia need to know that there
21 will be a serious penalty for that.

22 And, finally, based on everything I've seen, everything
23 I've received in connection with both sentencing hearings and
24 everything I've seen and heard in this case, I am concerned
25 that there is a significant risk that Mr. Morgovsky will engage

1 in criminal conduct in the future. And I believe, therefore,
2 that protecting the safety of the public is an important factor
3 in the list of sentencing factors that Section 3553(a)
4 provides.

5 And so considering all of those factors, I believe that a
6 guideline sentence is appropriate and I believe a sentence
7 within the middle of the guideline range is appropriate. So
8 the sentence for Mr. Morgovsky will be 108 months. That is
9 9 years. And I will also fine Mr. Morgovsky \$1 million for his
10 conduct. That will be the sentence.

11 Pursuant to the Sentencing Reform Act of 1984, it's the
12 judgment of the Court that Naum Morgovsky is hereby committed
13 to the custody of the Bureau of Prisons to be imprisoned for a
14 term of 108 months. This term consists of terms of 108 months
15 on each of Counts 9, 10, and 11, all counts to be served
16 concurrently.

17 Upon release from imprisonment, the defendant shall be
18 placed on supervised release for a term of three years. The
19 term consists of terms of three years on each of Counts 9, 10,
20 and 11, all such terms to run concurrently.

21 Within 72 hours of release from the custody of the Bureau
22 of Prisons, the defendant shall report in person to the
23 Probation Office in the district to which the defendant is
24 released.

25 While on supervised release, the defendant shall not

1 commit another federal, state, or local crime; shall comply
2 with the standard conditions that have been adopted by this
3 Court, except that the mandatory drug testing provision is
4 suspended; and shall comply with the following additional
5 conditions. These are your conditions of supervised release,
6 Mr. Morgovsky:

7 One, you must pay any special assessment that is imposed
8 by this judgment and that remains unpaid at the commencement of
9 the term of supervised release.

10 Two, you must not open any new lines of credit and/or
11 incur new debt without the prior permission of the probation
12 officer.

13 Three, you must provide the probation officer with access
14 to any financial information, including tax returns; and shall
15 authorize the probation officer to conduct credit checks and
16 obtain copies of the income tax returns.

17 Four, you must not possess any false identification and
18 shall provide your true identity at all times.

19 Five, you must cooperate with the collection of DNA as
20 directed by the probation officer.

21 Six, you must not own or possess any firearms, ammunition,
22 destructive devices, or other dangerous weapons.

23 Seven, you must submit your person, residence, office,
24 vehicle, or any property under your control to a search. Such
25 a search shall be conducted by a U.S. probation officer at a

1 reasonable time and in a reasonable manner based upon
2 reasonable suspicion of contraband or evidence of a violation
3 of a condition of release. Failure to submit to such a search
4 may be grounds for revocation. You must warn any residents
5 that the premises may be subject to searches.

6 It's further ordered that the defendant shall pay to the
7 United States a special assessment of \$300. Payment shall be
8 made to the Clerk of the U.S. District Court at 450 Golden Gate
9 Avenue, Box 36060, San Francisco, California 94102.

10 During imprisonment, payment of criminal monetary
11 penalties are due at a rate of not less than \$25 per quarter
12 and payment shall be through the Bureau of Prisons Inmate
13 Financial Responsibility Program.

14 And as I mentioned, I find that the defendant does have
15 the ability to pay the fine or will likely have the ability to
16 pay the fine in the future and, therefore, I order a fine of
17 \$1 million -- impose a fine of \$1 million.

18 **THE PROBATION OFFICER:** Your Honor, two things.

19 **THE COURT:** Yes.

20 **THE PROBATION OFFICER:** Then can we modify the
21 recommendation condition one to say "special assessment and
22 fine"?

23 **THE COURT:** Yes.

24 **THE PROBATION OFFICER:** And then --

25 **THE COURT:** So condition one of the special conditions

1 of supervised release will be that Mr. Morgovsky must pay any
2 special assessment that is imposed or fine that is imposed by
3 this judgment and that remains unpaid at the commencement of
4 the term of supervised release.

5 **THE PROBATION OFFICER:** And to set a payment schedule
6 for that fine and use the standard language that we would use,
7 and that would be about \$28,000 a month.

8 **THE COURT:** \$28,000 a month?

9 **THE PROBATION OFFICER:** (Nods head.)

10 **THE COURT:** Okay. The payment schedule will be
11 \$28,000 a month. That's upon supervised release; is that
12 correct?

13 **THE PROBATION OFFICER:** Correct.

14 **THE COURT:** Okay.

15 **MR. OSTERHOUDT:** When would that take effect,
16 Your Honor? I'm sorry.

17 **THE COURT:** Upon release.

18 Is that correct?

19 **THE PROBATION OFFICER:** Correct, Your Honor. They
20 will start collecting during the time of imprisonment but at a
21 rate of not greater than \$25 per quarter.

22 **THE COURT:** Got it.

23 Okay. Is there anything else? Are there any
24 recommendations you want me to make?

25 **MS. CORNELL:** Your Honor, if I may just jump in --

1 **THE COURT:** Yes.

2 **MS. CORNELL:** -- for the forfeiture provision on the
3 last page of the PSR.

4 **THE COURT:** Yes. Thank you.

5 So finally on forfeiture, the defendant's interest in the
6 following property shall be forfeited to the United States:

7 \$222,929.61.

8 Three Infratech night vision rifle scopes seized by the
9 FBI from Naum Morgovsky's residence on August 25th, 2016, and
10 identified in the United States Bill of Particulars as follows:

11 One, one optic lens, size small, tube Serial
12 Number 4654898, tube type F9815SLG.

13 Two, one optic lens, size medium, tube Serial
14 Number 4656232, tube type F9815SLG.

15 And, three, one optic lens, size large, tube Serial
16 Number 4732440, tube type F9815SLG.

17 Okay. Are there any placement recommendations or anything
18 that the defendant would like me to make?

19 **MR. ELLIS:** Yes, Your Honor. Can I have until
20 tomorrow to send you requested recommendations and language for
21 the judgment?

22 **MR. SAMPSON:** Your Honor, we've sought remand and we
23 think remand at the earliest date is appropriate. We defer to
24 the Court on designations.

25 **MR. ELLIS:** Yeah, well, I'll provide -- if the Court

1 will -- I'll provide the Court our requested recommendations
2 and language in support. Should I e-mail that to the Court or
3 does the Court --

4 **THE COURT:** Well, what about the issue of remand?

5 **MR. ELLIS:** Well, yeah, I'll get to that in a minute;
6 but is it okay --

7 **THE COURT:** Why don't we start with that.

8 **MR. ELLIS:** Okay. Very good.

9 Mr. -- Bill.

10 **MR. OSTERHOUDT:** Your Honor, Mr. Morgovsky has been
11 unfailingly faithful to his obligations, and I mean that
12 because ever since I've known him, he hasn't been late even a
13 moment for an appearance.

14 **THE COURT:** He has, but let me be honest with you, try
15 to be as transparent as I can with you about my thinking and
16 give you an opportunity to respond to it.

17 I am somewhat concerned that this may be one of those rare
18 cases where the defendant has simply been operating under the
19 assumption that he was going to beat the system and that now --
20 you know, every time you get a little bit closer to the final
21 point in the proceedings, which is sentencing, you know, there
22 may be somewhat of an increased flight risk.

23 Now, I'm concerned that it's at least possible that
24 Mr. Morgovsky was operating under the assumption that he was
25 going to beat the system, and now maybe feels like he was

1 unsuccessful in beating the system and may be a flight risk
2 now.

3 So what can you say to me about that?

4 **MR. OSTERHOUDT:** Please let me assure you that that's
5 not the case. We have talked about this a lot. He knows he
6 didn't beat the system. He pled guilty. He's read the
7 Presentence Report. He knows what the Government has
8 recommended. He knew that he was going to get a substantial
9 sentence today. He didn't know exactly what it was, and he
10 never wavered in his determination to come forward and to
11 accept the judgment of the Court.

12 He's just --

13 **THE COURT:** I guess that's a fair point. I mean,
14 particularly given that we had the sentencing hearing
15 previously --

16 **MR. OSTERHOUDT:** Right.

17 **THE COURT:** -- and sort of -- and then even in this
18 sentencing hearing -- for this sentencing hearing --

19 **MR. OSTERHOUDT:** Right.

20 **THE COURT:** -- the Defense at the lowest point I think
21 argued for 48 months or something like that.

22 **MR. OSTERHOUDT:** That's right.

23 **THE COURT:** Okay. So that's a fair point.

24 **MR. OSTERHOUDT:** That's the way he feels. He doesn't
25 feel that he beat the system. He knew this morning he would be

1 sentenced.

2 But I think that there's a lot of strong equities favor
3 allowing him to self-surrender. One of them, of course, is the
4 practical issue that it will avoid disadvantage to him within
5 the system. As the Bureau of Prisons in assessing security
6 levels and the like, they --

7 **THE COURT:** Well, except I don't think that it's
8 appropriate for me to consider that in -- I mean, the question
9 for me is: Is there clear and convincing evidence that he will
10 not present a danger to the community or be a flight risk
11 between now and his self-surrender date; right?

12 **MR. OSTERHOUDT:** Yes. And I think that -- I think
13 that there is because of his record of achievement in always
14 coming here. We've talked about that.

15 Also, I can assure you that he -- you know, he's always
16 been consistent in his determination to see this through and
17 obey the orders of the Court.

18 I think that the matter can be accommodated by conditions
19 of release until he turns himself in.

20 **THE COURT:** Well, right now -- I mean, right now he's
21 on lockdown in his house; right?

22 **MR. OSTERHOUDT:** And that should continue.

23 **THE COURT:** He's on electronic monitoring and he's not
24 permitted to leave the house.

25 **MR. OSTERHOUDT:** That should continue.

1 **THE COURT:** Okay. Is there anything else that can be
2 done?

3 **MR. OSTERHOUDT:** That can be he may have regular
4 contact he may require with Pretrial Services, if that would be
5 more helpful.

6 Also in assuring that, he has assurances given by his
7 family, his wife, and the rest that he's not -- you know, that
8 he's not going to run away; he's going to see this through.

9 He's not -- he's incapacitated really from doing any
10 violations by his lockdown status. He doesn't have the
11 wherewithal to export things or to engage in any criminal
12 activities. He's really disabled, Your Honor.

13 And although it may stray a little bit from what your
14 focus is, there are two things I want to resolve with him prior
15 to this next case. I've moved to withdraw from it, but I want
16 to talk to him about it and be very sure where we're going.
17 It's much more difficult if he's in custody this period.

18 Secondly, I think that the medical records shown this
19 morning indicates that he be given a short opportunity to take
20 care of those things before he embraces a 9-year sentence.

21 And with those things in mind, Your Honor, I hope that you
22 will grant him voluntary surrender as the Probation Office
23 recommended.

24 **THE COURT:** Okay. Anyone from the Government want to
25 respond in any way?

1 **MR. SAMPSON:** Briefly.

2 The Court just found a few moments ago that
3 Mr. Morgovsky's actions constitute a potential danger to the
4 community, the actions that led to his conviction, and his
5 sentence today.

6 In addition, his name is not on the car he drives. His
7 name is not on the house he owns. We don't know where his
8 money is.

9 He was just imposed with a very significant fine.

10 Mr. Morgovsky's wife will be reporting to prison on
11 January 4th.

12 And, additionally, Your Honor, it sounds like there will
13 be potentially delay or not a trial on the additional matters.
14 We don't think it's appropriate to delay the imposition of a
15 sentence beyond that point.

16 So the Government believes that a reporting date in the
17 very near future, which may allow him to obtain the immediate
18 medical care he needs but that ensures that he reports very,
19 very soon so that he does not pose a danger to the community or
20 potential risk of planning to flee, be imposed.

21 **THE COURT:** Well, why don't we impose a reporting
22 date -- the same reporting date as that of his wife, which is,
23 I believe, January 4th. Is that what you said?

24 **THE PROBATION OFFICER:** January 4th, Your Honor.

25 **THE COURT:** Okay. I will permit Mr. Morgovsky to

1 self-surrender in light of this discussion that we've had.

2 It is true that Mr. Morgovsky has been scrupulous in his
3 compliance with the terms of pretrial release for the last two
4 years; and when you combine that with the medical situation
5 that Mr. Morgovsky has, I'm comfortable saying that he can
6 self-surrender and that the standards have been met and he can
7 self-surrender on January 4th.

8 **MR. OSTERHOUDT:** Thank you very much. Thank you,
9 Your Honor.

10 **MR. ELLIS:** Your Honor, one other housekeeping item,
11 if I may. One other housekeeping item, if I may.

12 **THE COURT:** And, yes, you can.

13 By the way, to respond to your question, you can submit a
14 letter, and I want you to file it on the docket so that the
15 Government can have an opportunity to respond to it if it
16 wishes.

17 **MR. ELLIS:** Very good.

18 **THE COURT:** Submit a letter tomorrow requesting that I
19 make certain recommendations for Mr. Morgovsky's placement to
20 the Bureau of Prisons.

21 **MR. ELLIS:** Yes, thank you.

22 One last housekeeping item.

23 I reviewed the PSR. It indicates that he is -- that's
24 correct -- a naturalized U.S. citizen but sometimes the Bureau
25 can get sticky on these things and they like to see it

1 verified.

2 So all I would ask is that, I have here copies of his
3 passport -- it's been seized, of course -- that the Court
4 direct Probation to indicate that if he -- and put in the PSR,
5 the final PSR, the information from the passport and show that
6 it's verified that he is a U.S. naturalized citizen.

7 **THE COURT:** Why don't you go ahead and attach that to
8 the letter you submit tomorrow.

9 **MR. ELLIS:** Sure. Will do.

10 **THE COURT:** And then it will be part of the record and
11 the Bureau of Prisons will have access to it.

12 **MR. ELLIS:** Very good.

13 **THE COURT:** All right. Anything further?

14 **MR. SAMPSON:** No, Your Honor. Thank you for your
15 time.

16 **MR. OSTERHOUDT:** No, Your Honor.

17 **THE CLERK:** Just point of clarification. The
18 surrender time is 2:00 p.m. and it's to the designated Bureau
19 of Prisons facility. If one has not been designated by that
20 time, it's directly to the U.S. Marshals Office on the
21 20th Floor in this building.

22 **THE DEFENDANT:** Thank you.

23 **THE COURT:** And we will take a break before we begin
24 our regular criminal calendar. Why don't we begin the regular
25 criminal calendar at 11:15.

1 **MR. ELLIS:** Thank you.

2 (Proceedings adjourned at 11:08 a.m.)

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6 **CERTIFICATE OF REPORTER**

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled matter.

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10 DATE: Monday, November 26, 2018

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Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
U.S. Court Reporter

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